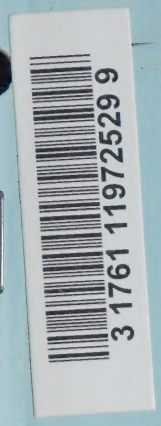




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# ABORIGINAL LAND CLAIMS ISSUES


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# ABORIGINAL LAND CLAIMS ISSUES

## INTRODUCTION

Aboriginal land claims today involve much more than strictly legal questions about the collective property rights of aboriginal people. Contemporary land claims issues are not simply, or even primarily, concerned with determining an appropriate amount of monetary compensation for existing land rights or for lands improperly taken away. While such compensation is an important element, the issue of aboriginal land claims is often as broad as the more general field of "aboriginal rights." Aboriginal people assert that, in addition to outstanding land rights questions, a range of political rights issues have also remained unresolved since colonial times and have been largely ignored since Confederation.

Government policy distinguishes between two kinds of land claims. Specific claims are defined as claims arising from specific unfulfilled legal obligations of the federal government (such as unfulfilled treaty provisions respecting reserve land entitlement). Current federal policy allows for the settlement of such claims by land grants or cash compensation.

Comprehensive claims are essentially composed of a legal element and a factual element. The legal element is a viable legal claim to unextinguished aboriginal title through demonstrating that the territory in question is not covered by a treaty or a claims agreement and that aboriginal title has not been extinguished by the Crown. The factual element must demonstrate traditional and, under current policy, *continuing* use and occupancy of the claimed territory by the claimant group since "time immemorial."

The broad-ranging nature of modern land claims is evident in these comprehensive claims, which are based upon unextinguished aboriginal title to land where the claimant group can establish a "traditional and continuing interest."(1) Negotiations of these claims typically involve compensation in various forms (money, land) and legal guarantees regarding resource use, control of local authorities such as school boards, and a voice in regulatory regimes affecting local concerns such as the environment. From the aboriginal perspective, these negotiations should necessarily include self-government matters in a comprehensive way. Current federal policy does not allow this, in order to avoid constitutional entrenchment of any self-government arrangement by operation of s. 35(3) of the *Constitution Act, 1982*.

Aboriginal rights, including aboriginal title, can be defined in a very general way as the pre-existing rights of the aboriginal people of this continent. These rights have their source in the period before aboriginal contact with European nations and have survived, to an undetermined degree, Euro-Canadian settlement and assertions of sovereignty. In the context of Canadian federalism, aboriginal rights define the relationship of aboriginal people, collectively and individually, with the federal and provincial governments. One of the most significant questions yet to be explicitly addressed by the Supreme Court is to what extent, if any, aboriginal peoples possess any residual sovereignty. This question has become even more critical since the enactment of s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms "existing aboriginal and treaty rights." Following the enactment of s. 35, First Ministers' Conferences on aboriginal rights between 1983 and 1987 failed to produce agreement on a definition of aboriginal rights, specifically an aboriginal right to self-government.

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(1) *Comprehensive Land Claims Policy*, Minister of Indian Affairs and Northern Development, 1986.

It is the view of some authorities that no one coherent theory satisfactorily explains how sovereignty over aboriginal peoples and their lands was accomplished in terms of 19th century international law. These authorities argue that the international legal theory used to rationalize the denial of the right to self-determination to indigenous people is problematic in view of the similar colonial experience of Third World peoples and the reasons advanced for recognizing their right to self-determination as a fundamental human right.(2)

The question is complicated, of course, by the fact that aboriginal people are not one undifferentiated group. They have historically distinguished among themselves as separate cultures, tribes, nations or peoples. These various groups experienced colonisation at different periods, and colonial and Canadian federal practice on the question of pre-existing aboriginal rights was inconsistent from one area to another.

Aboriginal land claims essentially arise from the failure of colonial and post-Confederation governments to address, precisely and adequately, the nature, content and scope of aboriginal rights to land, resources and political autonomy. Professor Sanders of the Faculty of Law at the University of British Columbia has described the development of colonial theory on aboriginal rights in Canada, as an *ad hoc* process that occurred as settlement moved westward; he has suggested that the legal doctrines commonly relied on to explain the acquisition of land and sovereignty are attempts to rationalize government practices after the fact:

> The various European powers which established colonies in the new world after 1492 did not begin with any theory of colonialism or any established law on the rights of indigenous populations. The Spanish debate on indigenous rights occurred after territories were captured. British theory came after British practice. The early British grants on the east coast of North America were silent on the question of indigenous

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(2) For example, E.S. Gordon Bennett, *Aboriginal Rights in International Law,* Royal Anthropological Institute of Great Britain and Ireland, 1978.

> rights and even on the fact of indigenous populations.(3)

Even when colonial policy on aboriginal rights had developed into an identifiable body of principles and was eventually codified in the Royal Proclamation of 1763, it was inconsistently applied by colonial and post-Confederation governments.(4) This is evident from looking at a map of Canada showing the large part of the country that is covered by treaty agreements and the large part that is not.

The precise legal nature of aboriginal title remains to be determined by the courts. Consequently, claims negotiations operate under a rather large cloud of legal uncertainty. The Supreme Court of Canada has had few opportunities to address aboriginal title questions and when it has, remarkably little has been said about it. This may change over the next five years or so, as a result of a few carefully framed yet broadly based aboriginal title claims now working their way through the courts. The Gitskan-We'tsuwe'ten claim *(Delgamuukw* v. *The Queen)* recently rejected by the British Columbia Supreme Court (March 1991) raises some of the most critical issues a Canadian court has ever had to address in this area of the law. The indigenous plaintiffs in this case have asserted a claim to some form of residual indigenous sovereignty as well as property rights in their traditional territory.

To date, the Supreme Court of Canada has confirmed that aboriginal title is a legal concept forming part of the common law of Canada - but without determining to what extent the territory of Canada is still subject to this interest. It is clear that aboriginal title can only be surrendered or sold to the Crown. Significantly, the Court has said that aboriginal title has sources independent of statutory or other forms of government recognition - in other words, that it is a "pre-existing right." The Court has also said that aboriginal title is an interest in

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(3) Douglas Sanders, *Aboriginal Self-Government in the United States,* Background Paper No. 5, *Aboriginal Peoples and Constitutional Reform,* Institute of Intergovernmental Relations, Queen's University, Kingston, 1985, p. 3.

(4) Douglas Sanders, "Native People in Areas of Internal National Expansion" (1974) 38 Sask. Law Rev. 63.

land that amounts to more than a right of use and occupancy. The Court has been very cautious in describing the nature of aboriginal title any further and has stated that it cannot be easily described in traditional property law terms *(Canadian Pacific Ltd.* v. *Paul,* [1989] 1 C.N.L.R. 47; *Guerin* v. *The Queen* [1984] 2 S.C.R. 335).

The legacy of the *ad hoc* development of indigenous land rights policy and ill-defined legal doctrines remains; large parts of British Columbia, the Yukon, the Northwest Territories and other parts of the country are not covered by any treaty and there is no definitive set of legal rulings that clearly define the nature and content of aboriginal title, the conditions required for it to subsist and how it may be extinguished.

Since the Supreme Court of Canada decision in *Calder* v. *A.G. of British Columbia* [1973] S.C.R. 313, recognizing the concept of aboriginal title as part of Canadian common law, the federal government has followed a policy of negotiating some of the land claims asserted by aboriginal people. The negotiation process available under the federal comprehensive claims policy provides an opportunity to settle certain claims through an administrative process. The claims recognized by the federal government are, essentially, those that the federal Department of Justice considers to have a sufficient legal basis to justify an out-of-court settlement. If a claim is judged "valid," and the Department of Indian Affairs accepts it for negotiation, the same Department has the mandate to negotiate a settlement and to allocate funds for claims research. Since 1973, federal policy has distinguished between "specific claims" (legal claims arising from federal obligations under treaties or from federal management of Indian assets (e.g., reserve lands and band funds) and "comprehensive claims" (claims based on unextinguished aboriginal title). The current federal policy statement on specific claims is a 1982 document entitled *Outstanding Business.* The original policy statement on comprehensive claims policy was entitled *In All Fairness* (1981). A revised policy statement was issued in March 1987 which modified some areas of the comprehensive claims policy but kept intact most aspects of the previous policy and process.

To date, 28 comprehensive claims have been accepted for negotiation. The land claims process is frequently criticized as intolerably slow - some claims have been under negotiation for 15 years. Of the three or four existing modern claims settlements, only one, the Western Arctic Claims Settlement, is truly the product of the comprehensive claims policy process. The Cree, Inuit and Naskapi settlements covering northern and northeastern Quebec are products of independent negotiations in the early 1970s that perhaps inspired the current policy.

The number of specific claims under active negotiation is not necessarily limited to a given number but is in practice restricted by the budgetary allocation in a given year for settlement of these claims.

The aboriginal community's frustration with the comprehensive and specific claims policy is high. Despite a federal review in 1985 and a "revision" in 1986, the comprehensive claims policy is not much different from when it was first announced in 1973. Many commentators have stated that parts of the comprehensive claims process should be managed or at least monitored by an independent agency. There is also mounting pressure from a number of sources for the creation of an independent tribunal to deal with specific claims. Some observers have concluded that at the current rate, it will take well into the next century and perhaps even longer to deal with both specific and comprehensive claims.

## SPECIFIC CLAIMS POLICY

Specific claims have been succinctly described by Mr. Justice La Forest, now of the Supreme Court of Canada:

> Basically, a specific claim is an allegation by the Indians that the Crown through its servants or agents has committed a wrong by maladministration of Indian matters or by breach of a treaty for which it ought to pay compensation.(5)

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(5) G.V. La Forest, *Report on Administrative Processes for the Resolution of Specific Indian Claims,* prepared for the Office of Native Claims, DIAND, 1979, p. 9.

In the 1982 federal policy statement on specific claims entitled *Outstanding Business*, the federal government stated its willingness to deal with two broad classes of specific claims. The first class is made up of claims based on unfulfilled "lawful obligations" of the federal government (e.g., non-fulfillment of treaty obligations, obligations arising out of the *Indian Act* or other statutory instruments, obligations arising from improper administration or illegal disposition of reserve land or band funds).

The second class of specific claims relates to situations involving some prejudice to Indian interests in reserve lands but not creating a legal obligation on the part of Canada; this class appears to be limited to two specific types of circumstances:

1) failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority (e.g., the B.C. cut-off claims or expropriations for a public purpose);

2) fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

The third main element of the 1982 policy is the federal government's commitment to examine each case on its merits and not to rely on technical legal defences (statutes of limitation, doctrine of laches) to reject negotiation of a claim. The government has, however, reserved its right to use such defences in litigation, and apparently does so in negotiations to discount the question of compensation claimed.(6)

Since the publication of *Outstanding Business*, the Department of Indian and Northern Affairs has undergone some reorganization affecting the claims area. The process for dealing with specific claims described in the policy statement is unchanged, except that a Specific Claims Branch has taken over the role of the now dismantled Office of Native Claims for receiving, assessing and negotiating specific claims.

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(6) Vic Savino, *The "Blackhole" of Specific Claims in Canada: Need It Take Another 500 Years?*, paper presented to Canadian Bar Association Conference, Winnipeg, April 1989, at p. 12.

Figures released by the Department of Indian Affairs reveal that the total number of specific claims "settled," in the sense that agreements have been reached with the parties concerned, is now at 47. Other claims have been processed with some degree of finality, but the degree of satisfaction of the native parties is not clear. For example, 44 claims have been rejected and 69 have been referred out of the specific claims process to other parts of the Department ("administrative referral"). In 52 cases the Department is taking no further action until more information is received from the claimant group ("closed file"). On this basis, the Department reports that 212 of the 606 claims submitted have been "resolved." Of the remaining 394, 292 are "in process" (of being negotiated) and 102 are in "other status" (suspended, under litigation or "claimant reassessment").(7)

The Minister of Indian Affairs, Tom Siddon, has said he would like to deal fairly with the outstanding specific land claims by the end of this century, and the Prime Minister has recently stated the government's intention to expedite the settlement process for both specific and comprehensive claims.

A recent Communiqué of the Department of Indian Affairs provides some details on government plans for a Specific Claims Commission and a Joint Indian/Government Working Group that would advise government on various matters relating to specific claims, including the working of the proposed Specific Claims Commission.(8) The Communiqué states that an Indian Specific Claims Commission would be established by Order-in-Council under Part I of the *Inquiries Act*, as an independent body and that "A band may go to the Commission when it disagrees with the Minister's rejection of its claim for negotiation. The Commission would make recommendations to the Governor-in-Council on whether the band has established that Canada has an outstanding lawful obligation as defined in the Specific Claims Policy." The Working Group would be composed of nominees of the Indian Affairs

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(7) As of 10 July 1991.

(8) Indian and Northern Affairs Canada, *Communique* #1-9135, April 25, 1991.

Minister and the Justice Minister and an equal number of members nominated by the Chiefs' Committee on Specific Claims. The Communiqué also announced some substantive policy change: the government will now consider specific claims arising from pre-Confederation treaties, a policy change long requested by native rights advocates.

The government's proposal keeps the existing process intact and adds additional steps. That is, there would be an opportunity to have Ministerial decisions on the validity of specific claims reviewed by the proposed Commission, but in a non-binding fashion. The proposed Commission also would have a mandate to review and make recommendations on criteria used in determining compensation if a claimant group so wished. Finally, claimants could still take matters to court if not satisfied with Commission recommendations or government decisions. The proposed commission would therefore be a review panel with no authority to bind either party by its decisions, rather than an adjudicative body. It appears that the Commission's mandate will be the object of study by a Joint Indian/Government Working Group announced in the same Communiqué. Among other matters, this Working Group may consider the following:

- the definition of a specific claim;
- validation criteria;
- compensation criteria;
- the working of the Specific Claims Commission;
- provincial involvement in the specific claims process.

Thus, the recommendations of the Working Group could address issues such as whether the Specific Claims Commission should have any adjudicative function and whether substantive aspects of claims policy (such as the definition of "specific claims") should be modified. The result of the working group process could be more substantial changes to policy and process if such recommendations are adopted by the Government. The creation of a tribunal and a task force with native representation to advise on its function is in some respects consistent with a recommendation of the 1988 Canadian Bar Association Committee Report, *Aboriginal Rights in Canada: An Agenda for Action.* However, that recommendation anticipated

some form of adjudicatory function for a specific claims tribunal. While the Task Force represents a form of consultation, the government has been accused of using the device of Chiefs Committees and Task Forces to bypass consultations with the Assembly of First Nations.

One of the first actions taken towards establishing the Indian Specific Claims Commission was announced in a communiqué issued by the Department of Indian Affairs. This stated that Mr. Harry S. LaForme, a member of the Mississaugas of the New Credit Indian Band, had been appointed as Chief Commissioner of the Indian Specific Claims Commission and would assume his duties on 5 August 1991.(9)

## COMPREHENSIVE CLAIMS POLICY

The federal government has had a comprehensive claims policy since 1973 but made it more explicit in 1981 by publishing a policy statement entitled *In All Fairness*. Since 1973, three comprehensive claims settlements (Final Agreements) have been ratified and are currently in operation:

1) the James Bay and Northern Quebec Agreement (1975)
2) the Northeastern Quebec Agreement (1978)
3) the Inuvialuit Final Agreement (1984)

In 1990, a Final Agreement was reached with the Dene/Metis in the Northwest Territories, as was an Umbrella Agreement with the Council of Yukon Indians. An Agreement-in-Principle was reached with the Tungavik Federation of Nunavut in 1990. The Yukon Agreement awaits ratification by the communities concerned. The Dene/Metis Agreement failed because it was not so ratified.

The federal government has recently lifted the limit on the number of accepted claims under negotiation. The comprehensive claims resolution process has been severely criticized in terms of policy and procedure. In response to widespread criticism, a federal task force chaired by Murray Coolican was struck in 1985 to review comprehensive

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(9) Indian and Northern Affairs Canada, Communiqué #1-9173, 15 July 1991.

claims policy. The "Coolican Report," officially entitled *Living Treaties: Lasting Agreements*, was submitted to the government in December of 1985.

## A. The Coolican Report

The Coolican Report recommended recasting federal policy objectives, by moving away from the goal of blanket extinguishment of all aboriginal rights and the view of aboriginal peoples and their rights as impediments to national economic growth. The Report suggested a new perspective in which claims resolution would be seen as negotiation of a social contract balancing the needs and rights of aboriginal societies with those of governments so as to ensure certainty of land ownership and development of land and resources.

The Report made a number of specific recommendations, summarized as follows:

- allowing alternatives to blanket extinguishment of aboriginal rights
- guaranteeing aboriginal participation in decisions about land and resource management
- including offshore rights in negotiations
- allowing for the possibility of resource revenue sharing
- allowing for pre-implementation of certain matters and for periodic review and adjustment of settlements (with reference to arbitration if necessary)
- acknowledging variation in benefits from settlement to settlement to reflect diverging economic needs and opportunities
- appointment of an independent Commissioner for Aboriginal Land Claims Agreements to monitor the process at all stages and to report to Parliament as needed
- use of framework agreements to ensure consensus at the beginning of negotiations about the key contents of a settlement and a timetable for negotiation and implementation(10)

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(10) *Northern Perspectives*, Vol. 15, No. 1, January-April 1987.

## B. The 1986 Statement of Comprehensive Land Claims Policy

In December 1986, the Honourable Bill McKnight, then Minister of Indian Affairs and Northern Development, announced a revised claims policy, the full text of which was published in March 1987. The government reaffirmed its policy commitment to resolution of comprehensive land claims through the negotiation of settlement agreements that are to provide certainty and clarity of rights to ownership and the use of land and resources in areas where aboriginal title has not been dealt with by treaty or superseded by law.

One significant change is that aboriginal groups are no longer required to extinguish *all* aboriginal rights, title and interests, but only those related to the use of and title to land and resources. Other aboriginal rights, to the extent they are defined through the constitutional process or recognized by the courts, are not affected by the policy. Certainty of title to land is required, but two options are available. Aboriginal groups may either:

> Convey all aboriginal title to settlement area lands, in exchange for grant-back of lands or land-related rights in agreed areas;
>
> or they may choose to:
>
> Convey aboriginal title to certain specified lands in claim area, and retain aboriginal title in selected lands.

In both cases other defined rights may apply in the entire settlement area.

Other aspects of the 1986 policy include the following:

- acknowledgement that land claims negotiations are more than real estate transactions;
- the range of negotiations is to be set by framework agreements beforehand;
- no land grants are to be made in areas of dispute between different aboriginal groups (overlapping claims);
- negotiations regarding harvesting rights (hunting, fishing, trapping) may include offshore areas;

- preferential harvesting rights for aboriginal claimants on unoccupied Crown lands may be negotiated; exclusive harvesting rights on selected lands are possible as are preferential rights for particular species of animals in a settlement area;

- subsurface rights on some federal Crown land and on settlement lands may be granted;

- revenue sharing in resource royalties (including offshore areas) may be negotiated but may be subject to some limitation such as a "dollar cap", time cap or decreasing percentage; revenue sharing would not involve resource ownership rights and may be deducted from any cash settlement;

- aboriginal participation in environmental management may be negotiated in the form of membership on advisory committees or other similar bodies or through participation in government bodies that have decision-making powers;

- acknowledgment that "community self-government" may form part of claims negotiations but self-government arrangements must be within existing constitutional principles and be consistent with "government practices"; self-government will take the form of delegated federal authority and "most aspects of such arrangements will not receive constitutional protection unless a constitutional amendment to this effect is in force";

- provincial participation in negotiations is encouraged and provinces should contribute to settlements in exchange for certainty of title;

- acknowledgment that appropriate interim measures must be established to protect aboriginal interests while claims are being negotiated;

- settlements are not to prejudice existing third party interests including non-aboriginal subsistence hunters, general public recreation, etc.;

- claimants will be advised within 12 months of the acceptance or rejection of their claims;

- framework agreement negotiations will be initiated where the Minister views the likelihood of successful negotiations to be high, the settlement of claims a priority and where necessary provincial or territorial participation may be obtained;

- a group must satisfy the Minister that it has a mandate to negotiate on behalf of the claimants;

- final agreements must be accompanied by implementation plans;

- a comprehensive Land Claims Steering Committee is to be established, composed of Assistant Deputy Ministers from the agencies and departments most involved, to review and provide advice to Ministers at all stages of the negotiation process.

### C. Aboriginal Response to Coolican Report and the 1986 Policy Statement

While the Coolican Report was almost universally praised by aboriginal groups, the 1986 policy statement has been criticized for moving very little from previous statements and for:

- not dealing with difficulties in defining claims as specific as opposed to comprehensive;

- retention of the concept of aboriginal title being "superseded by law" (e.g., by local land grants);

- failing to deal with the issue of conflict of interest (i.e., the federal government's role in deciding which claims to accept for negotiation, sitting in judgment of their legal validity and generally controlling the process from beginning to end is considered inappropriate given that the government also has a role as a party with interests to protect);

- failing to adopt the Coolican Report's recommendations for a process of modifying settlements and appointment of an independent Commissioner for Aboriginal Land Claims Agreements.

A December 1986 study for the Assembly of First Nations (AFN) is reported to have concluded that the 1986 claims policy statement, along with federal policies on self-government and constitutional amendment strategies, amounts to a policy of terminating federal responsibilities to aboriginal people. The AFN view is that the government's 1986 policy statement does not represent any significant departure from former policies on aboriginal title.

## CLAIMS POLICY ISSUES

Aboriginal people's criticisms of the process for submitting and negotiating a settlement of land claims - whether specific or comprehensive - have remained consistent over the years and have received support from a number of authorities. For example, a Committee of the Canadian Bar Association (CBA) conducted an analysis of aboriginal affairs policy in a document entitled *Aboriginal Rights in Canada: An Agenda for Action,* which was adopted by the CBA at its 1989 annual meeting. The Committee concluded that a new policy environment was needed for land claims matters before any constructive and meaningful discussions could be expected.

Many substantive and procedural aspects of both claims policies have never been accepted by aboriginal peoples as fair or reasonable. This paper will briefly outline a few of these concerns.

### A. Distinguishing Between Specific and Comprehensive Claims

One criticism of claims policy is the unclear distinction between specific and comprehensive claims. This is a major element of the well-publicized and ongoing dispute between the federal government and the Lubicon Lake Band. The Lubicon people were overlooked in the 1899 negotiations of Treaty No. 8, and a 1949 federal promise to supply a reserve has been embroiled in various delays and controversies.

A fundamental area of dispute is the federal position that the title of the Lubicon was extinguished by Treaty No. 8 because the territory to which the treaty was intended to apply includes Lubicon land. In this view, the Lubicon claim is essentially a treaty entitlement claim and therefore a specific claim, and the federal obligation is limited to compensation to be determined by the terms of the 1899 treaty. The Lubicon, on the other hand, consider themselves to have an unextinguished aboriginal title to their traditional lands and, therefore, a comprehensive claim, open to settlement on more expansive terms.

## B. Conflicts of Interest

The following quotation on the specific claims process from the CBA Report echoes many of the criticisms of the comprehensive claims process as well:

> Aboriginal leaders have expressed many times their perceptions of numerous conflicts of interest that the Specific Claims Branch may be in. First DIAND, which has been indicted as the cause of many of the claims filed, is asked to assess their "validity." Second, this same department controls access to the process and the funding. Third, the department acts to defend the federal government in reaching a compensation agreement with the Indian claimants; yet the department also has fiduciary or trust responsibilities to the Indian people to protect "Indians, and Lands reserved for the Indians," under section 91(24) of the *Constitution Act, 1867.* (11)

A number of authorities who have examined the federal land claims policy in recent years have focused particular attention on issues relating to process, in part because of conflict-of-interest issues and also because of the very slow rate at which both types of claims are settled. Some claims have been under negotiation for more than 15 years. Several authorities, and many aboriginal organizations, have recommended that the process for dealing with land claims, especially specific land claims, could be expedited and made more fair by involving some neutral third party to deal with some aspects. The notion of creating a quasi-judicial body to adjudicate specific land claims has been repeatedly suggested, most recently by the Canadian Bar Association, whose report recommended:

> After a thorough consultation with aboriginal people, perhaps with the utilization of a task force such as was used to develop the new policy on comprehensive claims, the federal government should proceed with the creation of a legislatively based specific claims tribunal with a clearly defined mandate to adjudicate the resolution of special claims.

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(11) *Aboriginal Rights: An Agenda for Action,* p. 55.

In 1979, Mr. Justice La Forest concluded in a report for the government that:

> The need for impartiality and the appearance of impartiality as well as finality in determining Indian claims strongly argue for the establishment of an independent body separate from departmental structures for the settlement of specific claims.(12)

Comprehensive claims are regarded as less suitable for this kind of adjudication; successful settlements will likely involve a number of complex matters, such as the type of legislation to be applied in the settlement territory, that are more amenable to political settlement than judicial or administrative adjudication. However, recommendations have been made over the years for creation of an independent body to handle the allocation of research and negotiation funds to comprehensive claimant groups. Funding issues arose repeatedly in the negotiations with the Dene/Metis of the Northwest Territories. The House of Commons Standing Committee on Aboriginal Affairs in May 1991 recommended an independent body to advise government on which specific and comprehensive claims to accept. The Committee also recommended that, subject to consultations with aboriginal groups, the federal government:

- Establish a judicial tribunal independent of government to deal with the validity of specific claims and to recommend compensation required to meet valid claims;

- Establish an independent body to monitor and review the implementation of claims policy and of claims agreements to ensure fairness;

- Establish a National Mediation Service, independent of the Department of Indian Affairs and Northern Development and of the Department of Justice, composed of expert mediators in each region of the country acceptable to the parties involved. These people would be made available to apply their mediation skills to

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(12) *Report on Administrative Processes for the Resolution of Specific Indian Claims,* prepared for the Office of Native Claims, DIAND, 1979, p. 64.

> prevent local land use conflicts from expanding into larger disputes.(13)

Proposals for claims commissions and other forms of third-party involvement have been made for many years in Canada. For example, Joint Committees of the Senate and the House of Commons in 1946-48 and 1959-61 recommended the creation of an Indian Claims Commission. Enabling legislation to establish such a Commission died on the Order Paper in 1963 and 1965. An Indian Claims Commission, with advisory powers only, was eventually created in 1969, with Dr. Lloyd Barber as the sole Commissioner. The Commission, which was eventually dismantled, was regarded by aboriginal organizations as powerless and, consequently, ineffective.

In June 1989, the federal government appointed a "Treaty Commissioner" to address outstanding treaty issues in Saskatchewan. In his report of May 1990, Commissioner Wright made recommendations on how to facilitate the settlement of treaty land entitlements (a category of specific claims) in Saskatchewan. The federal government views the use of a Treaty Commissioner and the Saskatchewan report as initiatives from which other treaty groups could benefit.

The 1990 Indian Commission of Ontario (ICO) report on aboriginal land claims policy, *Discussion Paper Regarding First Nations Land Claims,* concluded that the basic choice in considering models for claims resolution is between negotiation and adjudication. The Indian Commission of Ontario is an independent body established by joint federal-provincial Orders-in-Council in 1978 and intended to assist in the resolution of issues of mutual concern to Canada, Ontario and First Nations, including land claims issues. The ICO favoured empowering an independent commission such as itself with powers to motivate parties to negotiate in an expeditious fashion.

The *Discussion Paper Regarding First Nations Land Claims* of the Indian Commission of Ontario commented on concerns about adjudicative tribunals in the following manner: "There is a real and present concern by

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(13) House of Commons, *The Summer of 1990,* Fifth Report of the Standing Committee on Aboriginal Affairs, Minutes of Proceedings and Evidence, Issue No. 59, May 1991, at p. 32.

the First Nations that any tribunal that may be established not model itself too closely on the practices and procedures of a court of law. This would appear to be the most common complaint regarding the United States Indian Claims Commission in that it followed the adversary system and played a wholly passive role of weighing evidence" (p. 87).

There are advantages and disadvantages to both negotiation and adjudication models. Doug Sanders has noted the potential for claims commissions to be élite, non-consensual models for change. On the other hand, Sanders has also questioned the assumptions he says underlie the current negotiations model of federal claims policy. These assumptions are:

1. that negotiations presume agreement on what claims should be settled;

2. that there is a continuing government commitment to settle claims;

3. that governments will organize themselves properly to negotiate settlements; and

4. that there is equality of bargaining power between native and government parties.(14)

Sanders has concluded, "Something seems wrong with the assumptions behind the choice of negotiation alone as the best method of settling claims... If there is a real commitment to settle some of these claims, there seems little question we need new institutions."(15) Sanders also has compared the extreme slowness in settling claims in Canada under the negotiations model with the speed of the Aboriginal Land Commissioner's work and notes the problem of not having an institution in Canada to carry on previous commitments when federal or provincial governments change.

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(14) Background Paper for the Canadian Bar Association Special Committee on Native Justice in 1988: *The Australian Aboriginal Land Commissioner,* publication forthcoming by the CBA.

(15) *Ibid.*

### C. Extinguishment of Aboriginal Title

There are fundamental differences between the government and aboriginal people on the appropriate goal of the claims settlement process. Governments are intent on achieving an extinguishment of aboriginal title. Aboriginal people, on the other hand, object strongly to the notion of extinguishment and see claims negotiations rather as an opportunity for the parties to work out an agreement on the practical implications of aboriginal title. On this issue, Georges Erasmus, National Chief of the Assembly of First Nations, has stated:

> We have opposed extinguishment on many grounds: our aboriginal rights flow from the ownership of the land; extinguishment severs our links with the past, and ensures that our future rights will flow from the government's granting of rights. This converts our rights into privileges. In addition, extinguishment prevents revival of our aboriginal rights when the government does not honour its agreement. And, finally, we oppose it because it is unnecessary.(16)

Extinguishment of aboriginal title is often seen by native rights advocates as extinguishing an aspect of inherent rights to self-government and not just property rights.

### D. Aboriginal Title "Superseded by Law"

Federal land claims policy attempts to address some but not all of the aboriginal title claims currently being asserted. For example, the federal government generally refuses to acknowledge the validity of aboriginal title claims in most of the Maritime provinces and parts of British Columbia, claiming that aboriginal title there has been "superseded by law." The government argues that the actions of successive governments, before and after Confederation, in opening up lands for settlement, granting lands by letters patent, granting rights to third parties and setting aside Indian reserve lands, had the effect of overriding and

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(16) Georges Erasmus, "Twenty Years of Disappointed Hopes," Introduction to *Drum Beat, Anger and Renewal in Indian Country,* Boyce Richardson, ed., Summerhill Press/The Assembly of First Nations, Toronto, 1989, at p. 17.

implicitly extinguishing aboriginal title in all lands other than Indian reserves. This position is one of the most highly disputed aspects of federal claims policy. This controversial view of how aboriginal title could be extinguished prior to the enactment of s. 35 of the *Constitution Act, 1982* was recently supported by the B.C. Supreme Court case *Delgamuukw* v. *The Queen* (March 1991) and will be a major point of appeal.

The concept of aboriginal title superseded by law is also reflected in one of the requirements imposed by the federal government for acceptance of a comprehensive claim for negotiation: that the claimant group establish not only traditional use and occupancy of the territory claimed but must also show continued use and occupation. The Sechelt Band and the Musqueam Band in British Columbia have had claims rejected because they could not do this.

This requirement presents a number of problems for aboriginal claimants. It is not clear what degree of use by non-indigenous people is required to trigger rejection. It seems obvious that *exclusive* use and occupancy in the literal sense is not required, or else very few, if any, claims would be possible. There is no guidance on this point in the 1986 policy statement and some aboriginal people say that the requirement for current use and occupancy is a recent innovation that was not part of the 1981 comprehensive claims policy statement, *In All Fairness*.

The Sechelt Band has stated that this policy places bands located near urban centres at a particular disadvantage and argues that it penalizes aboriginal people who have tried to respect the law by respecting the contested title of non-indigenous people while seeking recognition of their own rights within the system. In a letter from the Sechelt Band Council to the Honourable William McKnight of 1 September 1988, the Band Council stated:

> We have traditionally complied with laws as they have been passed and done our best, as a people, to reconcile our own ways with those of our new neighbours... As a result, we Sechelts have withdrawn to those little pieces of land - formerly known as Indian reserves - as directed by the federal government. Now it would appear that we are to be severely penalized for having complied with the law. For example, we still hunt and fish, but we carry out these

> activities according to Canadian law, not to provoke disputes over the extent of our aboriginal rights. Is the federal government now saying that if we were to hunt, fish and otherwise occupy our traditional lands in defiance of law, our claim would be validated? Please ponder the implications of this curious and quite disgraceful position.

### E. Exclusion of Self-Government Agreements from Land Claims Agreements

The 1986 statement of comprehensive claims policy provides that "a new feature of the policy will be to allow for negotiation of a broader range of self-government matters." The policy statement also provides, however, that self-government arrangements negotiated through claims settlements will not receive constitutional protection "unless a constitutional amendment to this effect is in force." This means that the government prefers to negotiate self-government arrangements separately from other matters in order to avoid entrenchment pursuant to s. 35(3) of the *Constitution Act, 1982.* This subsection provides that the recognition and affirmation of existing treaty rights in s. 35(1) includes "rights that now exist by way of land claims agreements or may be so acquired."

The Final Agreements reached in the Yukon and the Northwest Territories are examples of how this aspect of claims policy has been implemented so far. They both provide for the negotiation of separate agreements on self-government. Delegated federal authority is contemplated and specific provision is made so that these self-government agreements shall not be construed as aboriginal and treaty rights within the meaning of section 35 of the *Constitution Act, 1982.* Both claimant groups, however, will be able to take advantage of any future constitutional amendments recognizing aboriginal self-government rights.

The government has explained this aspect of its policy (reaffirmed by a Cabinet decision announced in February 1990) as maintaining equity between Indian groups with self-government arrangements negotiated either within or without the claims settlement process. In the absence of a constitutional amendment generally protecting self-government rights, the federal government argues that it would be unfair to allow some groups to have such protection just because they happened to have

negotiated their right to self-government through a claims settlement. However, it may be too late to avoid such inequity. A provincial court decision *(Eastmain Band* v. *Gilpin)* respecting the *Cree-Naskapi (of Quebec) Act* held that the self-government rights of the Crees under the Act, having been promised by the James Bay and Northern Quebec Agreement, were made constitutional by s. 35(3) and that "any change to the Natives' existing rights would be legal only if brought about by a constitutional amendment." From the aboriginal viewpoint, land and self-government are inseparable issues. Georges Erasmus, National Chief of the Assembly of First Nations, has said:

> Land, and jurisdiction over land, go hand and hand [sic]. We have been pressing for fair land settlement to provide the basis for an economically viable life for our people, but we have also insisted on our right to aboriginal self-government over that land. By this, we mean our right to exercise jurisdiction over our traditional lands, resources, and people.(17)

Before the Standing Senate Committee on Aboriginal Peoples, National Chief Georges Erasmus suggested that federal officials were willing to agree to a reversal of this policy position in return for the cooperation of aboriginal people in permitting early debate of the Meech Lake Accord in the Manitoba Legislature (Minutes of Proceedings and Evidence, Issue No. 8:81).

## CONCLUSION

A number of fundamental differences between government and native parties' approaches to land claims issues have led to conflicts over many elements of claims policy. For example, from the indigenous perspective, the existence of continuing aboriginal title is not in doubt and requires a settlement on the future relations between the parties on a government-to-government basis (in the sense of inter-Canadian governments). The federal government acknowledges the possibility of existing aboriginal title for the purpose of claims negotiations but argues against

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(17) *Ibid.*

it in court. Though the federal government acknowledged, in its 1986 revised statement of claims policy, that comprehensive claims settlements are more than mere real estate transactions, it regards aboriginal title as a property issue to be dealt with largely independently of self-government issues; aboriginal claimant groups are seen as private landholders of settlement lands rather than as government landholders. Further, the federal government insists on extinguishment of aboriginal title throughout any traditional lands not retained under aboriginal control by the settlement agreement.

# STATUS OF NATIVE LAND CLAIMS

(based on information received from the
Department of Indian Affairs and Northern Development)

## COMPREHENSIVE CLAIMS (AS OF JULY 1990)

| | |
|---|---|
| Settled Claims | 3 |
| - Cree and Inuit (Quebec) | |
| - Naskapi (Quebec) | |
| - Inuvialuit (NWT) | |
| Claims in Negotiation | 6 |
| - Nisga's Tribal Council | |
| - Labrador Inuit Association | |
| - Conseil Attikamek Montagnais | |
| Dene Nation/Metis Assoc. of NWT | |
| - Tungavik Federation of Nunavut | |
| - Council for Yukon Indians | |
| Accepted Claims | 19 |
| Rejected Claims | 4 |
| Claims Under Review | 6 |
| Action Suspended at Request of Claimants | 1 |
| Anticipated Claims | 10 |

## SPECIFIC CLAIMS (AS OF 30 MARCH 1990)

Claims Resolved:

| | | |
|---|---|---|
| - Settlements Achieved | 44 | |
| - Rejected | 44 | |
| - Administrative Referral | 69 | |
| - Closed File | 48 | |
| Total Claims Resolved: | | 205 |

Claims in Process:

| | | |
|---|---|---|
| - Settlement Process | 6 | |
| - Approved Negotiating Mandate | 15 | |
| - Development of Mandate | 51 | |
| - Under Justice Review | 73 | |
| - Under Specific Claims Review | 130 | |
| Total Claims in Process: | | 275 |

Claims in Other Status

| | | |
|---|---|---|
| - Suspended | 21 | |
| - Under Litigation | 22 | |
| - Claimant reassessment | 55 | |
| Total Claims in Other Status | | 98 |

Total Band Claims Submitted to Date: 578